SERVED: July 14, 1993

NTSB Order No. EA-3926

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 28th day of June, 1993

JOSEPH M. DEL BALZO, Acting Administrator, Federal Aviation Administration, Complainant, v. NASEEM N. SALIBA, Respondent.	Docket SE-11302

OPINION AND ORDER

This case stems from a July 26, 1990 order in which the Administrator suspended respondent's private pilot certificate for 30 days for alleged violations of sections 61.3(e)(1), 91.105(a) and 91.9 of the Federal Aviation Regulations ("FAR," 14 C.F.R.), in connection with a flight occurring on July 11,

1989.[1] In the Administrator's order of suspension (which served

[1]FAR §§ 91.105(a) and 91.9, which have since been amended and recodified as §§ 91.155(a) and 91.13(a), respectively, read:

"§ 91.105 Basic VFR weather minimums.

(a) Except as provided for in §§ 91.105(b) [which applies to helicopter flights and night flights by airplanes in an airport traffic pattern within 1/2 mile of a runway] and 91.107 [which sets forth special VFR weather minimums applicable when proper clearance is given by air traffic control (ATC)], no person may operate an aircraft under VFR when the flight visibility is less, or the distance from the clouds is less than that prescribed for the corresponding altitude in the following table:

Altitude	Flight visibility	Distance from clouds
1,200 feet or less above the surface--		
Within controlled airspace....	3 statute miles..	500 feet below. 1,000 feet above. 2,000 feet horizontal.
Outside controlled airspace:		
Day: (except as provided in section 91.105(b)).....	1 statute mile...	Clear of clouds.
Night: (except as provided in section 91.105(b)).....	3 statute miles..	500 feet below. 1,000 feet above. 2,000 feet horizontal.
More than 1,200 feet above the surface but less than 10,000 feet MSL--		
Within controlled airspace....	3 statute miles..	500 feet below. 1,000 feet above. 2,000 feet horizontal.
Outside controlled airspace:		
Day.....	1 statute mile...	500 feet below. 1,000 feet above. 2,000 feet horizontal.
Night.....	3 statute miles..	500 feet below. 1,000 feet above. 2,000 feet horizontal.
More than 1,200 feet above the surface and at or above 10,000 feet MSL.....	5 statute miles..	1,000 feet below. 1,000 feet above. 2,000 feet horizontal.

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless

as the complaint), the following factual allegations were made:

1. At all times material herein, you were and are the holder of Private Pilot Certificate Number 001005226.

2. On or about July 11, 1989, you, as pilot in command, operated civil aircraft N7350B, a Beechcraft 35, on a passenger carrying flight from Macon, Georgia to Paducah, Kentucky.

3. The above described flight was conducted pursuant to Visual Flight Rules (VFR).

4. During the course of the above described flight in the vicinity of Centerville, Tennessee, you operated N7350B in clouds and other weather conditions less than that required for VFR flight.

5. At the time of the above described flight you did not hold an instrument rating.

In his answer, respondent, acting pro se, admitted all of the above factual allegations, except for recounting that the flight's destination was St. Louis, Missouri and not Paducah, Kentucky.[2] The Administrator subsequently filed a motion for

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manner so as to endanger the life or property of another."

FAR § 61.3(e)(1) provides:

"§ 61.3 Requirement for certificates, rating, and authorizations.

* * * * *

(e) Instrument rating. No person may act as pilot in command of a civil aircraft under instrument flight rules or in weather conditions less than the minimums prescribed for VFR flight unless--

(1) In the case of an airplane, he holds an instrument rating or an airline transport pilot certificate with an airplane category rating on it."

[2]This point was later conceded by the Administrator (see Administrator's Motion for Partial Summary Judgment at 1), although he did not formally amend his complaint to reflect that the flight in question terminated in St. Louis. The destination of respondent's flight is not, however, relevant to the issues raised in this case.

partial summary judgment, in which he maintained that such admissions established the alleged violations of FAR sections 61.3(e)(1) and 91.105(a).[3] That motion was opposed by respondent on the basis that "the factual admissions in [the a]nswer do not constitute violations of the [regulations] set forth in the [c]omplaint." Thereafter, in an order issued on November 30,

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With respect to the Administrator's legal determination that, based on the facts alleged in the complaint, he had violated the cited FAR provisions, respondent averred that he "became inadvertently involved with marginal weather conditions" as a result of a weather briefing that proved to be inaccurate. He also suggested that a malfunctioning VOR receiver and a vector provided by ATC contributed to his encountering adverse meteorological conditions.

[3]In his motion, the Administrator did not contend that the alleged FAR § 91.9 violation had been substantiated by virtue of respondent's admissions. Indeed, he suggested that an evidentiary hearing remained necessary to determine whether such a violation occurred and whether the sanction he imposed upon respondent should be sustained. See Administrator's Motion For Partial Summary Judgment at 2-3.

1990, Administrative Law Judge Jimmy N. Coffman granted the Administrator's motion, leaving the issues of the validity of the section 91.9 charge and the propriety of the sanction assessed by the Administrator to be disposed of at an evidentiary hearing.[4]

[4]A copy of Judge Coffman's decisional order is attached.

The case was subsequently reassigned to Administrative Law Judge William R. Mullins, who presided over an evidentiary hearing on those remaining matters on June 19, 1991. At the conclusion of that hearing, Judge Mullins issued an oral initial decision affirming the Administrator's determination that respondent had violated section 91.9 and sustaining the 30-day suspension imposed for the three alleged FAR violations.[5]

Respondent has appealed from each of the law judges' rulings. In his brief, he maintains that he did not have an opportunity to present his defenses to the section 61.3(e)(1) and 91.105(a) charges because no hearing was held in connection with the consideration of the Administrator's summary judgment motion. Thus, respondent asserts that he was denied due process in Judge Coffman's disposition of those charges. With respect to the initial decision, respondent contends that the evidence does not support a finding of a section 91.9 violation. He also avers that Judge Mullins showed bias against him by making remarks which disparaged the type of aircraft he was flying.[6]

The Board does not, however, believe that reversible error has been demonstrated with respect to either of the law judges' rulings. Consequently, we will deny respondent's appeal.

Turning first to respondent's assertion that Judge Coffman

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[5]An excerpt from the transcript containing Judge Mullins' initial decision is attached.

[6]The Administrator has submitted a reply brief, in which he urges the Board to affirm both Judge Coffman's order and Judge Mullins' initial decision.

should have conducted a hearing prior to ruling on the Administrator's motion for partial summary judgment, we must point out that hearings on motions made in connection with the adjudication of certificate enforcement actions are neither required nor, as a general matter, contemplated under the Board's Rules of Practice.[7] In addition, we note that respondent did not request such a hearing while the Administrator's motion was pending. Consequently, we are unpersuaded by respondent's argument on appeal as to the necessity for a hearing on that motion.

Despite the fact that no hearing was mandated, we note that, apart from his factual admissions, respondent raised certain matters in his answer[8] which were aimed at establishing an affirmative emergency defense under FAR section 91.3(b).[9]

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[7]See 49 C.F.R. § 821.14(d), which provides:

"§ 821.14 Motions.

* * * * *

(d) Oral argument; briefs. No oral argument will be heard on motions unless the Board or the law judge directs otherwise. Written memoranda or briefs may be filed with motions or answers to motions, stating the points and authorities relied upon in support of the positions taken."

[8]See n.2, supra.

[9]FAR § 91.3(b), as was in effect at the time of the flight in question, read:

"§ 91.3 Responsibility and authority of pilot in command.

* * * * *

(b) In an emergency requiring immediate action, the pilot in command may deviate from any rule of this subpart . . . to the extent required to meet that emergency."

The Board has long held that, for an affirmative defense founded upon § 91.3(b) to be valid, the emergency situation faced by the airman asserting that defense must be one which was not of

Because such matters arguably raised a genuine controversy as to whether respondent could be relieved of liability for violations of sections 61.3(e)(1) and 91.105(a), it is questionable as to whether Judge Coffman should have granted the Administrator's summary judgment motion. However, for the reasons stated below, we believe that any error committed by Judge Coffman in this regard was harmless.

At the June 19, 1991 evidentiary hearing, respondent sought to establish an emergency defense to the section 91.9 charge based on the same matters he set forth in his answer. After weighing the evidence, Judge Mullins found that FAR section 91.3(b) did not apply and, therefore, rejected that defense.[10] Respondent's appeal brief fails to suggest that he would have offered any additional evidence in support of such a defense to the section 61.3(e)(1) and 91.105(a) allegations. Thus, it does not appear that respondent was deprived of an opportunity to place in the record evidence tending to buttress his claimed emergency defense with respect to any of the FAR violations alleged.[11] As this is the case, we do not believe that

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his own making and which could not have been avoided by the exercise of sound judgment before and during the flight. See, e.g., Administrator v. Wilson, 1 NTSB 1367, 1369 (1971).

[10]See Tr. 57.

[11]In this regard, the Board notes that a § 91.9 violation is ordinarily considered to be residual to violations of other operational FAR provisions. See, e.g., Administrator v. Cory, NTSB Order EA-2767 at 6 (1988); Administrator v. Dutton, NTSB Order EA-3204 at 6-7 (1990); Administrator v. Thompson, NTSB Order EA-3247 at 5 n.7 (1991); Administrator v. Simonton, NTSB

respondent was prejudiced by Judge Coffman's ruling granting the Administrator's motion for summary judgment on the section 61.3(e)(1) and 91.105(a) charges absent a showing that Judge Mullins erred in rejecting his emergency defense at the evidentiary hearing.

In this regard, we note that respondent indicated at the hearing that he received an extensive and favorable weather briefing on the day before his flight. He also testified that, on the day of the flight, he asked the Macon Flight Service Station (FSS) "if my aircraft was VFR," but did not inquire as to whether any flight precautions existed along his intended route.[12] We concur with the FAA operations specialist who opined at the hearing that respondent's day of flight inquiry was inadequate and that a diligent pilot would have requested a complete weather briefing before taking off, rather than relying primarily on day-old meteorological information.[13]

The evidence further relates that, after taking off, respondent first encountered adverse meteorological conditions between Rome and Shelbyville, when he found himself between

> a layer of scattered-to-broken clouds below and overcast

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Order EA-3734 at 6 n.9 (1992). Indeed, at the evidentiary hearing in this case, Judge Mullins noted that "the 91.9 violation would be residual to these other two, so I'm going to have to hear evidence about those even though [violations of] those two FAR's . . . have [previously] been determined." Tr. 6.

[12]Tr. 20.

[13]See id. 37-38.

above.[14] In our opinion, such conditions should have suggested

[14]Id. 13, 21-22. Generally, "broken" means 6/10 to 9/10 cloud cover and "overcast" means complete cloud cover. See Administrator v. Schoenbachler, 1 NTSB 683, 685 n.6 (1969); Administrator v. Gaub, 5 NTSB 1653, 1654 n.4 (1986); Administrator v. Whitham, NTSB Order EA-3282 at 6 n.7 (1991).

to respondent that it was not prudent for him to proceed further along his intended route and that he needed to divert his course away from the worsening weather. Instead, respondent continued along that route and flew into the deteriorating conditions, ultimately penetrating clouds between Shelbyville and Centerville before returning to VFR conditions.[15] Under these circumstances, we agree with Judge Mullins that the weather emergency in which respondent found himself was one of his own making, which could have been avoided through the exercise of sound judgment before and during the flight. Consequently, FAR section 91.3(b) does not exculpate respondent from liability for the regulatory violations alleged by the Administrator.[16]

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[15]The Board notes that respondent sought the assistance of ATC after he initially encountered the cloud layers between Rome and Shelbyville. At first, he attempted to reach the Shelbyville FSS, but was unsuccessful in doing so because he did not dial the proper frequency. Tr. 13, 23, 36. He then contacted Memphis Air Route Traffic Control (ARTC) but did not inform that facility of the adverse meteorological conditions he was in or that he was not IFR qualified or equipped for several minutes. Id. 24-25; Ex. C-1. In his first communication with Memphis ARTC, he merely sought information as to whether the conditions at Farmington, which was further along his route, were VFR. Ex. C-1.

[16]With respect to respondent's claims that a vector given by ATC routed him into a thunderstorm and a defective VOR receiver hampered his ability to navigate, thus contributing to his professed emergency, the Board notes that he neither requested nor received a vector until more than six minutes after his initial communication with Memphis ARTC and that he did not inform that facility that his VOR receiver was malfunctioning for another 15 minutes. Ex. C-1. Thus, it does not appear that either of those factors played a role in his initial encounter with non-VFR conditions. Accordingly, they cannot provide a valid basis for a § 91.3(b) defense. See Administrator v. Wagner, NTSB Order EA-3047 at 5-7 (1990).

Turning next to respondent's contention that Judge Mullins exhibited bias against him at the hearing, we note that, in making that claim, respondent cites a portion of the initial decision in which Judge Mullins indicates that he is "aware" that the type of aircraft which respondent was flying had a "record of not holding together in thunderstorms."[17] We do not, however, believe that the expression of such a view, standing alone, demonstrates bias.[18] Moreover, upon a thorough review of the record in this case, the Board is unable to detect a lack of objectivity on Judge Mullins' part in either his treatment of the parties or his evaluation of the evidence. In short, we are unconvinced that Judge Mullins in any way compromised the fairness of the adjudicatory process.

Finally, we find that the 30-day certificate suspension which was assessed by the Administrator and sustained by Judge Mullins for respondent's section 61.3(e)(1), 91.105(a) and 91.9 violations is well within the acceptable range of sanctions imposed for such infractions.[19] We will therefore affirm that suspension here.

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[17]Tr. 56.

[18]In this regard, we note that bias refers to the mental attitude of a law judge vis-a-vis the parties and not to any views he or she might entertain regarding the subject matter involved in the case. Petition of Spivey, 3 NTSB 2657, 2663 (1980); Petition of Parker, 4 NTSB 541, 545 (1982).

[19]See, e.g., Administrator v. Wilson, supra; Administrator v. Mason, 2 NTSB 89 (1973); Administrator v. Thomas, 2 NTSB 709 (1974); Administrator v. Shaff, 4 NTSB 696 (1983), affirmed 720 F.2d 684 (9th Cir. 1983).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order, Judge Coffman's grant of his motion for partial summary judgment and Judge Mullins' initial decision are all affirmed; and
3. The 30-day suspension of respondent's private pilot certificate shall begin 30 days from the date of service of this order.[20]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[20]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).